

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

75-7517/7580

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 75-7517 and 75-7580

N. V. MAATSCHAPPIJ VOOR INDUSTRIELE
WAARDEN,

Petitioner-Appellee,

v.

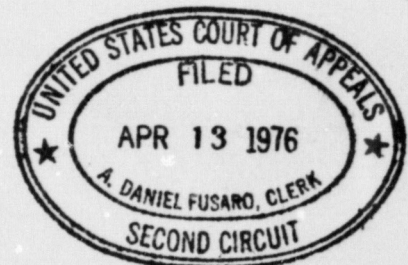
A. O. SMITH CORPORATION,

Respondent,

and

ARMOR ELEVATOR COMPANY, INC.,

Respondent-Appellant.



PETITION FOR REHEARING

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N. V. MAATSCHAPPIJ VOOR INDUSTRIELE
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Petitioner-Appellee,

v.

A. O. SMITH CORPORATION,

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and

ARMOR ELEVATOR COMPANY, INC.,

Respondent-Appellant.

PETITION FOR REHEARING

The respondent-appellant petitions for a rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure for the reason that the written opinion of this Honorable Court contains a statement which, in the opinion of the petitioner, is not supported by the record and which statement,

if left uncorrected, would tend to be misinterpreted by the arbitrators in the proceedings about to commence. The opinion of this Court states at page 2911:

"With respect to the claims of patent invalidity, we note that appellant, in support of its claims, points to a letter received from Westinghouse Canada Limited, dated April 29, 1975, which indicated that certain patents licensed in the agreement would 'probably infringe various Westinghouse patents.' This letter, however, was not unsolicited. Rather, it was written in response to a letter sent by Armor to Westinghouse in which Armor indicated that it intended to commence production under these patents when, in fact, it apparently had no intention of so doing." (Underlining supplied).

The underlined portion of that part of the opinion quoted above is not in itself determinative of the issues decided on this appeal or likely to change the result. It is, however, a statement not supported by the record and at the very least one that is still at issue. More importantly, the statement is bound to be misleading to the arbitrators in determining the issues that the Court has ruled are properly before them. There is no evidence in the record that Armor did not intend to commence production under the Agreement

when its counsel first wrote to Westinghouse Canada, Ltd. on February 26, 1975, the letter to which Westinghouse responded by its letter dated April 29, 1975 (A. 94).

Armor had asserted prior to the time the February 26, 1975 letter was written that it had not yet received sufficient know-how from MVIW under the License Agreement to enable it to commence manufacture. However, there was no manifestation of a lack of intent to manufacture should the required know-how be provided under the Agreement. In fact, the record clearly indicates that both parties had resolved in January 1975 to proceed under the Agreement. Mr. Spitzer, MVIW's counsel, in his letter dated February 18, 1975 referred to the fact that on January 23, 1975 Armor had agreed to make payments of certain minimum royalties and to report to MVIW all claimed deficiencies in the know-how furnished under the Agreement within 30 days, and MVIW agreed to respond thereto within 90 days (A. 92).

These understandings, including the payment of \$12,500 (Australian) in addition to the \$75,000 (Australian) previously paid by Armor to MVIW certainly do not manifest an intent on Armor's part not to manufacture.

Again, Mr. Johnson in his letter to Mr. Spitzer dated May 8, 1975, referred to "the continuing performance by the parties under the MVIW contract" (A. 95).

Thus, it is clear that there is no evidence that in February of 1975 Armor did not intend to manufacture under the License Agreement when sufficient know-how had been furnished to it by MVIW. Instead, the evidence indicates that Armor did intend to do so.

It has been Armor's position throughout these proceedings that MVIW has failed to furnish Armor with the technical information required under Article III to enable it to manufacture the Licensed Products. This Court, in its affirmation of Judge Bonsal's decision, has determined that it is for the arbitrators to determine the validity of Armor's position and whether or not it constitutes a defense to the claims asserted by MVIW (A. 168).

Since the underlined portion of that part of the opinion quoted above is not necessary to the conclusions reached by this Court, since it is not supported by the record or, at the very least, is still at issue, since it deals with subject matter within the scope of those matters

to be arbitrated, which arbitration is scheduled to commence on June 3, 1976, and since such statement in the opinion may be misconstrued by the arbitrators, it is respectfully urged that such portion should be deleted from the opinion and accordingly a rehearing is requested for such purpose.


Dated: New York, New York
April 1, 1976

Respectfully submitted,

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I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to favorable consideration of the Court and that it is not filed for the purpose of delay.

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By  partner
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Jas. J. Field
4/13/76